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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

WATER, INC.,

Plaintiff,

v.

EVERPURE, INC., et al.,

Defendants.

CASE NO.: CV 08-218 ABC (SSx)

ORDER RE: MOTION TO DISMISS OR  
TRANSFER VENUE

Pending before the Court is Defendants' Motion to Dismiss or Transfer ("Motion"), filed on June 6, 2008. Plaintiff filed an Opposition, and Defendant filed a Reply. The Court found the Motion appropriate for resolution without oral argument and took it under submission. Upon consideration of the materials submitted by the parties and the case file, the Court hereby **GRANTS** the Motion.

**I. BACKGROUND**

Plaintiff Water, Inc. ("Plaintiff") filed its initial Complaint in this action in January 14, 2008, asserting fourteen claims against

1 Defendant, including antitrust claims, interference claims, and claims  
2 for unfair competition and breach of contract, among others. On May  
3 19, 2008, Defendant Everpure Inc. ("Defendant") moved to dismiss the  
4 case for improper venue or to transfer venue to the United States  
5 District Court for the Northern District of Illinois. Defendant  
6 argued that a forum selection clause in the parties' 1996 Distribution  
7 Agreement ("Agreement") upon which Plaintiff's claims were based  
8 requires Plaintiff to litigate this action in the Illinois court.  
9 Plaintiff filed no opposition to the motion. Instead, on May 22,  
10 2008, Plaintiff gave Defendant notice of termination of the Agreement  
11 (FAC ¶ 11) and on July 2, 2008, Plaintiff filed its First Amended  
12 Complaint ("FAC") asserting thirteen claims against Defendant,  
13 including antitrust claims, interference claims, and a claim for  
14 unfair competition, among others, but no breach of contract claim.  
15 Because the Complaint was superceded by the FAC, the Court struck the  
16 motion to dismiss or transfer as moot.

17 Defendant again moves to dismiss the case for improper venue  
18 pursuant to Fed. R. Civ. Proc. 12(b)(3), or to transfer venue pursuant  
19 to 28 U.S.C. § 1406(a). Defendant contends that despite Plaintiff's  
20 attempts to avoid the forum selection clause by excluding the breach  
21 of contract claim and attempting to purge references to the Agreement  
22 from its FAC, its claims nevertheless relate to the Agreement.  
23 Defendant urges the Court to view Plaintiff's FAC as an exercise in  
24 artful pleading and to enforce the forum selection clause. Plaintiff  
25 opposes, arguing that the FAC is not an attempt at artful pleading.  
26 Rather, Plaintiff contends that the claims in the FAC - predominantly  
27 antitrust and unfair competition claims - are different from those in  
28 the Complaint. Specifically, the gist of these claims is that

1 Defendant is intimidating Plaintiff's customers into not doing  
2 business with Plaintiff, thereby attempting to push Plaintiff out of  
3 the market for residential water treatment products and increase its  
4 own market share. Furthermore, Plaintiff states that it filed the FAC  
5 not to avoid the forum selection clause, but rather because it  
6 terminated the Agreement on May 22, 2008 and the nature of the  
7 parties' relationship therefore changed. Accordingly, because the  
8 Agreement is no longer in place, its claims are not and cannot be  
9 related to it.

## 10 11 **II. LEGAL STANDARDS**

12 A motion to dismiss for improper venue based on the enforcement  
13 of a forum selection clause is governed by Rule 12(b)(6). Arqueta v.  
14 Banco Mexicano, S.A., 87 F.3d 320 (9th Cir. 1996). Analysis under  
15 Rule 12(b)(3) permits the district court to consider facts outside of  
16 the pleadings. Arqueta, 87 F.3d at 324.

17 The plaintiff has the burden of showing that venue is proper.  
18 See Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491 (9th  
19 Cir. 1979). If the Court determines that venue is improper, it must  
20 "dismiss, or if it be in the interest of justice, transfer such case  
21 to any district or division in which it could have been brought." 28  
22 U.S.C. § 1406(a).

23 "Forum selection clauses are prima facie valid, and are  
24 enforceable absent a strong showing by the party opposing the clause  
25 "that enforcement would be unreasonable or unjust, or that the clause  
26 [is] invalid for such reasons as fraud or overreaching." Bremen v.  
27 Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). Forum selection clauses  
28 can be equally applicable to contractual and tort causes of action.

1 In the Ninth Circuit, "[w]hether a forum selection clause applies to  
2 tort claims depends on whether resolution of the claims relates to  
3 interpretation of the contract." Manetti-Farrow, Inc. v. Gucci  
4 America, Inc., 858 F.2d 509, 514 (9th Cir. 1988) (citation omitted).

### 6 III. DISCUSSION

7 The Agreement is attached as Exhibit A to the Declaration of  
8 Michael Madsen. The forum selection clause therein states, in  
9 relevant part:

10 Since Everpure and [Plaintff] have a significant interest in  
11 consistent interpretation of this agreement, and Everpure expects  
12 to have Select Master Distributors throughout the United States,  
13 Everpure and [Plaintiff] irrevocably submit, and waive any  
14 objection either may have, to personal jurisdiction or venue in  
15 the state and federal courts of applicable subject matter  
16 jurisdiction where Everpure's executive offices are located in  
17 Illinois. All remedies provided in this Agreement are cumulative  
18 and, except for forum selection under this Section, are in  
19 addition to any remedy otherwise available under applicable  
20 federal, state or local law." (Madsen Decl. Ex. A, § 10.9.)

21  
22 The Court rejects Plaintiff's meritless assertion that this text  
23 does not constitute a forum selection clause. Its plain language  
24 indicates that the parties agreed to litigate disputes under Illinois  
25 law, in the venue where Defendant's executive offices are located. It  
26 is undisputed that Defendant's executive offices are within the  
27 Northern District of Illinois. Furthermore, the clause identifies  
28 itself as a forum selection clause, and its language is unambiguous.

1 Also, because it uses the phrase "irrevocably submit" rather than  
2 "submit," the clause is mandatory. Finally, Plaintiff advances no  
3 other arguments suggesting "that enforcement would be unreasonable or  
4 unjust, or that the clause [is] invalid for such reasons as fraud or  
5 overreaching." Bremen, 407 U.S. at 15. Accordingly, the Court need  
6 only decide whether the claims in the FAC relate to interpretation of  
7 the contract and, if so, whether to dismiss or to transfer the case.

8 A foundational premise of Plaintiff's argument that its claims  
9 are not related to the Agreement is that the Agreement is no longer in  
10 effect because Plaintiff terminated it on May 22, 2008. Defendant  
11 asserts that Plaintiff's attempted termination of the Agreement was  
12 itself a breach of contract. On this Motion, the Court need not  
13 resolve whether Plaintiff's attempt to terminate the Agreement was in  
14 fact effective and/or whether the notice was itself a breach.  
15 However, as Plaintiff itself implicitly concedes, the progress of this  
16 litigation does hinge upon that question. Section 9 of the agreement  
17 establishes the limited circumstances under which the parties could  
18 cause an early termination of the Agreement. Under that section,  
19 Plaintiff could terminate the Agreement only (1) if Defendant notified  
20 Plaintiff of a "Distribution Policy" change that Plaintiff does not  
21 accept, and Defendant insists on the change, or (2) if Defendant  
22 became insolvent, or (3) if Defendant failed to cure its own breach  
23 after notice from Plaintiff and a 30 day opportunity to cure.  
24 Plaintiff does not attempt to explain whether its termination of the  
25 agreement fell within one of the limited conditions under which such  
26 termination was permitted.

27 Furthermore, the resolution of many of Plaintiff's claims as  
28 Plaintiff itself has pled them turns on certain contract terms. For

1 example, Plaintiff's third claim for relief for violations of the  
2 Lanham Act asserts that Plaintiff "has been the exclusive licensee of  
3 the trademark 'Everpure' when used in association with the Ever Brands  
4 products in the Western states for the past 29 years." (FAC ¶ 45.)  
5 Plaintiff asserts that Defendant is using "the trademark 'Everpure' in  
6 the Western states in association with products that are likely to  
7 cause confusion among the public with the Ever Brands products  
8 [Plaintiff] has marketed under the trademark 'Everpure' for thirty  
9 years." (FAC ¶ 46.) The relief Plaintiff seeks under this claim  
10 includes an injunction to stop Defendants' "sale of water chillers and  
11 instant hot product under the trademark 'Everpure' [because that  
12 conduct] has the likelihood of creating confusion in the marketplace."  
13 (FAC ¶ 46.) This claim implicates several terms of the Agreement,  
14 including section 1.3 (appointing Plaintiff as the exclusive  
15 distributor in the territory); section 6 (wherein Plaintiff  
16 "acknowledges the validity and ownership by [Defendant] of the  
17 registered trademarks 'Everpure' . . . and will respect the rights of  
18 [Defendant] in their other trademarks); and section 10.1 (an  
19 integration clause stating that the written agreement constitutes the  
20 entire agreement between the parties).

21 Although Plaintiff argues in its Opposition brief that its FAC  
22 does not challenge Defendant's right to use the 'Everpure' mark, the  
23 FAC is replete with allegations such as those quoted above doing  
24 exactly that. See, e.g., FAC ¶¶ 45, 59, 69-72, 74-75 and 94-99.  
25 These allegations implicate at least five of Plaintiff's claims (the  
26 third, fifth, seventh, eighth, and thirteenth claims for relief), and  
27 Plaintiff cannot escape its own pleading. The Agreement includes a  
28 term, section 6, wherein Plaintiff recognizes Defendant's rights to

1 the 'Everpure' mark. It is therefore clear that Plaintiff has  
2 asserted claims challenging Defendant's use of the mark "Everpure,"  
3 and that these claims are related to interpreting the terms of the  
4 Agreement.

5 In addition, Plaintiff's FAC refers to "conduct and  
6 representations" of Defendants that gave rise to what Plaintiff claims  
7 was an "exclusive license to sell the EVERPURE filtration device under  
8 the mark 'Everpure'. . ." (FAC ¶ 94.) Although Plaintiff suggests  
9 that this license arises out of a course of conduct going back 30  
10 years to the parties' "verbal 'hand shake' agreement," see FAC ¶ 8,  
11 the 1996 Agreement includes an integration clause stating that that  
12 document comprises the entirety of the parties' agreement and  
13 expressly superceding any other agreements or understandings. (Madsen  
14 Decl. Ex. A, § 10.3.) Thus, even insofar as Plaintiff's claims are  
15 based on a license arising out of prior conduct, that means, at a  
16 minimum, that the Agreement is implicated because of its integration  
17 clause.

18 Finally, section 5.5 of the Agreement is implicated in  
19 Plaintiff's sixth claim for relief, for violation of Cal. Bus. &  
20 Profs. Code § 17200. Therein, Plaintiff contends that Defendant  
21 misappropriated Plaintiff's confidential marketing plan. (FAC ¶ 62.)  
22 Under section 5.5 of the Agreement, Defendant "reserve[d] the right to  
23 approve all promotion practices, advertising or literature." Thus,  
24 whether Defendant's alleged use of Plaintiff's marketing plan violated  
25 section 17200 likely requires a determination of whether that use was  
26 in fact contracted for in the Agreement.

27 In short, it is clear that many of Plaintiff's claims "relate[]  
28 in some way to rights and duties enumerated in the" Agreement.

1 Manetti-Farrow, 858 F.2d at 514. These claims are therefore within  
2 the scope of the forum selection clause.

3 The Court finds it unnecessary to determine whether each and  
4 every claim stated in the FAC relates directly to the Agreement. It  
5 is clear that at least five of Plaintiff's claims are directly related  
6 to the Agreement, and that the remainder of Plaintiff's claims are  
7 related to those five claims and to the business relationship between  
8 the parties memorialized in the Agreement. The forum selection clause  
9 is broad enough to encompass all causes of action or claims related to  
10 the business relationship established by the Agreement. See, e.g.,  
11 Stewart Organization, Inc. v. Ricoh Corp., 810 F.2d 1066, 1070 (11th  
12 Cir. 1987) (finding that because the forum selection clause governed  
13 all claims relating to the parties' business relationship evidenced by  
14 the contract, it necessarily governed claims that were not contractual  
15 in nature). Furthermore, judicial economy would not be served by  
16 severing the case between those claims that directly relate on the  
17 Agreement and those that relate to it indirectly, and litigating the  
18 action in two fora. Rather, all claims are best litigated in the same  
19 forum. Therefore, because at least five of Plaintiff's claims are  
20 directly related to the Agreement, and the Agreement's mandatory forum  
21 selection clause requires that these claims be litigated in the  
22 Northern District of Illinois, all of Plaintiff's claims will be  
23 transferred there. The Court finds that transferring the action to  
24 that district, rather than dismissing the case, is in the interests of  
25 justice under 28 U.S.C. § 1406(a); indeed, Plaintiff expressed no  
26 preference for dismissal of the case rather than transfer.

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IV. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Defendant's Motion to Transfer pursuant to 28 U.S.C. § 1406(a) and hereby **ORDERS** the case to be transferred to the United States District Court for the Northern District of Illinois.

IT IS SO ORDERED.

DATED: August 4, 2008



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AUDREY B. COLLINS  
UNITED STATES DISTRICT JUDGE



**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

312 North Spring Street, Room G-8  
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(951) 328-4450

**SHERRI R. CARTER**  
District Court Executive and  
Clerk of Court

**To:** Clerk, United States District Court  
\_\_\_\_\_ District of \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Re:** Transfer of our Civil Case No. \_\_\_\_\_  
Case Title: \_\_\_\_\_

Dear Sir/Madam:

**An order having been made transferring the above-numbered case to your district, we are transmitting herewith our file:**

- ☐ Original case file documents are enclosed in paper format.  
☐ Electronic Documents are accessible through Pacer.  
☐ Other: \_\_\_\_\_  
\_\_\_\_\_

Very truly yours,

Clerk, U.S. District Court

Date: \_\_\_\_\_

By \_\_\_\_\_  
Deputy Clerk

cc: All counsel of record

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By \_\_\_\_\_  
Deputy Clerk